

1 D. Victoria Baranetsky (SBN 311892)
2 THE CENTER FOR INVESTIGATIVE REPORTING
3 1400 65th St., Suite 200
4 Emeryville, CA 94608
5 Telephone: (510) 809-3160
6 Fax: (510) 849-6141
7 vbaranetsky@revealnews.org

8 Attorney for Plaintiffs

9
10
11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 THE CENTER FOR INVESTIGATIVE
15 REPORTING and PATRICK MICHELS,

16 Plaintiffs,

17 v.

18 UNITED STATES DEPARTMENT OF
19 HEALTH AND HUMAN SERVICES,

20 Defendant.

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF**

21 **INTRODUCTION**

22 1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552,
23 for injunctive and other appropriate relief. The Center for Investigative Reporting ("CIR") and
24 Patrick Michels (collectively "Plaintiffs") seek expedited processing and release of agency records
25 requested from Defendant the United States Department of Health and Human Services ("HHS")
26 pertaining to records from the Office of Refugee Resettlement ("ORR") under the Administration
27 for Children and Families ("ACF").

28 2. In 2017 and 2018, Plaintiffs submitted Freedom of Information Act requests (the
"Requests") to ORR seeking disclosure of federal records discussing procedures and contracts
related to housing for unaccompanied minors which has been publicly acknowledged.

3. To date, Defendant has failed to issue a response, comply with FOIA's statutory deadlines and has improperly withheld records responsive to the Request.

4. HHS's delay and improper withholding is of particular public concern because the records pertain to a fast-changing matter of great public interest: the federal government's provision of housing and care for children for whom it has assumed responsibility.

5. Plaintiffs now ask the Court for an injunction requiring HHS to promptly release the withheld records.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1436, and 5 U.S.C. §§ 701–706.

7. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1391(e) and 1402. Plaintiff CIR has its principal place of business in this district. Plaintiff Patrick Michels is domiciled in this district.

8. Assignment to the Oakland Division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action occurred in Alameda County, where Plaintiff CIR's principal place of business is located and most actions in this case occurred.

PARTIES

9. Plaintiff CIR is the nation's first nonprofit investigative journalism organization and made the FOIA requests at issue in this case. CIR publishes *Reveal* an online news site at revealnews.org and *Reveal* a weekly public radio show with approximately 2 million listeners a month. CIR has received multiple awards for its reporting. CIR is a nonprofit established under the laws of the State of California, with its primary office in Emeryville, California.

10. Plaintiff Patrick Michels is a staff reporter for *Reveal* and an employee of CIR.

11. Defendant HHS is a department of the executive branch of the U.S. government and an “agency” within the meaning of 5 U.S.C. § 552(f)(1). ORR and ACF are components of HHS. HHS has its headquarters in Washington, D.C. and offices all over the country, including in Oakland

1 and San Francisco, California.

2 FACTUAL BACKGROUND

3 **HHS and ORR Responsibilities for Unaccompanied Minor Children**

4 12. By law, HHS must provide custody and care of unaccompanied minor children
5 (“UAC”), defined as children who do not have lawful immigration status in the United States, have
6 not attained 18 years of age and have no legal guardian in the United States to provide care and
7 custody. *See* 6 U.S.C. § 279(g)(2).

8 13. In 2002 under the Homeland Security Act “Congress transferred the care and custody
9 of these children to HHS...to move towards a child welfare-based-model of care for children and
10 away from the adult detention model.” ACF, *Fact Sheet* (Jan. 2016),
11 https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf

12 14. Six years later, Congress “expanded and redefined HHS’s statutory responsibilities”
13 by passing the Trafficking Victims Protection Reauthorization Act which directed “that each child
14 must ‘be promptly placed in the least restrictive setting that is in the best interest of the child.’” *Id.*
15 (citing 8 U.S.C. § 1232(b)(2)).

16 15. Responsible for providing “people in need with critical resources to assist them in
17 becoming integrated members of American society”, ORR is the federal office within HHS that
18 houses and cares for many unaccompanied children detained by the United States. ORR, *About*
19 *Unaccompanied Alien Children’s Services* (June 15, 2018), <https://bit.ly/2GQtM3K>.

20 16. Undocumented minors apprehended by DHS officials for crossing the U.S. border
21 illegally are immediately transferred to the custody of ORR and temporarily housed in contracted
22 facilities, until the agency can place the minor with a family member or sponsor in the United States.
23 *Id.*; *see also* ORR, *Children Entering the United States Unaccompanied: Section 2* (Jan. 30, 2015),
24 <https://bit.ly/2JYxZZs>.

25 17. According to ORR’s website, the particular circumstances of these children make
26 them especially vulnerable. The “age of these individuals, their separation from parents and
27 relatives, and the hazardous journey they take make unaccompanied alien children especially
28 vulnerable to human trafficking, exploitation and abuse.” ORR, *About Unaccompanied Alien*

1 *Children's Services, supra.*

2 18. For this reason, it is especially important "[t]hese care provider facilities are state
3 licensed *and must meet* ORR requirements to ensure a high level of quality of care...[as t]hey provide
4 a continuum of care for children, including foster care, group homes, shelter, staff secure, secure,
5 and residential treatment centers." *Id.* (emphasis added).

6 19. ORR's requirements for the care provider facilities are in part set out in various
7 cooperative agreements, grant agreements, and contracts. *See id.* (stating "[t]he care providers
8 operate under cooperative agreements and contracts, and provide children with classroom education,
9 health care, socialization/recreation, vocational training, mental health services, family reunification,
10 access to legal services, and case management.")

11 **Increase of Unaccompanied Minor Children In ORR's Custody**

12 20. In 2017, pursuant to the Trump Administration's new policies, ICE began arresting
13 and detaining an increasing number of unaccompanied minor children for being suspected of alleged
14 gang membership and referring them to ORR where they are detained in "some of the most restrictive
15 detention facilities available for juveniles." Anjali Tsui, *In Crackdown on MS-13, a New Detention*
16 *Policy Raises Alarms*, FRONTLINE, Feb. 18, 2018, <https://to.pbs.org/2EFw59r>.

17 21. Based on interviews and documents published by the agency, it appears the network
18 of ORR shelters is quickly expanding to handle this influx of unaccompanied minors. *See, e.g.,*
19 ORR, J&A UNDER FAR SUBPART 6.3 – JUSTIFICATION FOR OTHER THAN FULL AND OPEN
20 COMPETITION, *available at* <https://bit.ly/2K1s4mH> ("[i]n order to meet the increase in referrals of
21 unaccompanied alien children (UAC) with violent criminal background and gang affiliation, Office
22 of Refugee Resettlement (ORR) needs to procure secure bed capacity needs...to accommodate this
23 influx that has caused the current facilities to experience over capacity issues.")

24 22. For instance, ORR announced a contract award of a grant for \$1,768,571 "for the
25 immediate need for additional capacity of shelter services to accommodate the increasing number of
26 UC referred by the Department of Homeland Security (DHS) into ORR care." ORR, Announcement
27 of the Award of One Single Source Expansion Supplement Grant Within the Office of Refugee
28 Resettlement's Unaccompanied Children's Program, 82 Fed. Reg. 14,903 (Mar. 23, 2017),

1 <https://bit.ly/2K3L3wP> (stating the “increase in the UC population necessitates the need for
2 expansion”); *see also* ORR, Announcement of the Award of 48 Single-Source Low-Cost Extension
3 supplement Grants Within the Office of Refugee Resettlement’s Unaccompanied Alien Children’s
4 (UAC) Program, 82 Fed. Reg. 26,806 (June. 9, 2017), <https://bit.ly/2MMXieO> (announcing “the
5 award of 48 single source low-cost extension supplement grants for a total of \$110,480,457 under
6 the Unaccompanied Alien Children’s (UAC) Program”).

7 23. Grant announcements posted publicly on the ACF Funding Opportunity
8 Announcements website also confirm these circumstances. *See, e.g.*, ACF Home Study and Post
9 Release Services for Unaccompanied Children Funding Opportunity, No. HHS-2017-ACF-ORR-
10 ZU-1139 (May 26, 2016), <https://bit.ly/2MkTD79>; ACF, Residential (Long Term Foster
11 Care) Services for Unaccompanied Children Funding Opportunity, No. HHS-2017-ACF-ORR-ZU-
12 1135 (June 30, 2016), <https://bit.ly/2tw2ye8>; ACF, Residential (Secure) Services for
13 Unaccompanied Alien Children Funding Opportunity, No. HHS-2017-ACF-ORR-ZU-1134 (May
14 31, 2016), <https://bit.ly/2ltS3Ej>.

15 24. ORR has also published an explanation of one contract expanding ORR housing in
16 Virginia. ORR, J&A UNDER FAR SUBPART 6.3, *supra* (stating “In order to meet the increase in
17 referrals of unaccompanied alien children with violent criminal background and gang affiliation,
18 Office of Refugee Resettlement (ORR) needs to procure secure bed capacity....”).

19 25. News organizations have long been covering the expansion of this program. For
20 instance in 2014, *Mother Jones* published a map of these shelters made from information collected
21 through a 2014 FOIA request. Ian Gordon, *This is Where The Government Houses the Tens of*
22 *Thousands of Kinds Who Get Caught Crossing the Border*, MOTHER JONES, Jun. 3, 2014,
23 <https://bit.ly/2Mc515Y>. More recently, *The Washington Post* covered the influx and capacity for
24 these shelters. Colby Itkowitz, *The Health 202: The Small HHS Agency Detaining Migrant Kids*
25 *Isn’t Meant For the Task*, THE WASHINGTON POST, June 20, 2018, <https://wapo.st/2yGsZnc>.

26 26. CIR consistently reported on this and related issues of public importance. Aura
27 Bogado, Patrick Michels, Vanessa Swales and Edgar Walters, *Migrant Children Sent to Shelters*
28 *With Histories of Abuse Allegations*, REVEAL, June 20, 2018, <https://bit.ly/2thYTBt>; Reveal and

1 PRX, *Reveal Answers Your Questions About Immigration*, REVEAL, June 9, 2018,
2 <https://bit.ly/2JwLyPu>; Patrick Michels, *Federal Agency Refers Girls to Counselors Picked By Anti-*
3 *Abortion Group*, REVEAL, Nov. 21, 2017, <https://bit.ly/2AiJA0l>.

4 27. The public need for disclosure of documents discussing these contracts is compelling
5 as the disclosure of these contracts would reveal how public funds are being allocated and would
6 reveal what requirements contractors are held to and if they are complying with federal mandates in
7 caring for UACs while under government supervision.

8 **The Requests**

9 28. On November 10, 2017 Mr. Michels submitted a FOIA request to ORR, HHS seeking
10 copies of currently active contracts for housing unaccompanied minors. A true and correct copy of
11 that letter is attached as Exhibit A.

12 29. More specifically, it requested:

- 13 a. The Memorandum of Agreement signed by DHS and HHS regarding unaccompanied
14 children, signed on February 22, 2016.
- 15 b. Copies of currently active contracts between ORR and grantees for Residential
16 (Secure) Services for Unaccompanied Alien Children; Residential (Staff Secure)
17 Services for Unaccompanied Alien Children; Residential (Shelter) Services for
18 Unaccompanied Children; Residential (Long Term Foster Care) Services for
19 Unaccompanied Children; Residential (Therapeutic) Services for Unaccompanied
20 Alien Children.
- 21 c. Copies of religious exemption requests from recipients of the above-mentioned
22 grants, and records indicating whether those requests were approved or denied, dated
23 from May 31, 2016, to November 10, 2017.
- 24 d. Records indicating the number of unaccompanied minors referred to ORR by date
25 range (weekly, monthly or quarterly), and the name of the referring agency, from
26 January 1, 2016, to November 10, 2017.
- 27 e. Records sufficient to show the average time in ORR custody for unaccompanied
28

1 minors from January 1, 2016, to November 10, 2017.

2 f. Copies of training materials delivered received by ORR from the Department of
3 Homeland Security concerning methods of identifying members of the gang MS-13.

4 g. Reports, memos or presentations resulting from ORR's review of unaccompanied
5 minors in its secure and staff secure facilities on June 9, 2017, concerning potential
6 gang involvement.

7 *See Ex. A.*

8 30. Plaintiffs sought a waiver of search and review fees on the grounds that the CIR
9 qualifies as a "representative of the news media" and that the records are not sought for commercial
10 use. 5 U.S.C. § 552(a)(4)(A)(ii) and (iii).

11 31. Plaintiffs sought expedited processing on the grounds that there is a "compelling
12 need" for these records because the information requested is urgently needed by an organization
13 primarily engaged in disseminating information in order to inform the public about actual or alleged
14 federal government activity. 5 U.S.C. § 522(a)(6)(E).

15 32. Plaintiff Mr. Michels certified that all statements were true to the best of his
16 knowledge.

17 33. On February 7, 2018, Mr. Michels sent an email ACF's FOIA office and requested
18 an update on the status of his request. A true and correct copy of that letter is attached as Exhibit B.

19 34. On February 8, 2018, ACF sent an acknowledgement letter and assigned the case
20 number 18-F-0050. A true and correct copy of that letter is attached as Exhibit C.

21 35. Mr. Michels did not receive any further response from the agency.

22 36. On March 29, 2018, Mr. Michels sent a new request, referencing the original request
23 and additionally requesting more copies of contracts related to ORR homes. A true and correct copy
24 of that letter is attached as Exhibit D.

25 37. More specifically, it requested:

26 a. Copies of currently active contracts between ORR and grantees for Home Study and
27 Post Release Services for Unaccompanied Children.

28 b. Copies of religious exemption requests from recipients of the above-mentioned

1 grants, and records indicating whether those requests were approved or denied, dated
2 from November 10, 2017, to the date at which this request is processed.

3 c. Records indicating the number of unaccompanied minors referred to ORR by date
4 range (weekly, monthly or quarterly), and the name of the referring agency, from
5 November 10, 2017, to the date at which this request is processed.

6 d. Records sufficient to show the average time in ORR custody for unaccompanied
7 minors from November 10, 2017, to the date at which this request is processed.

8 *See Ex. D.*

9 38. Plaintiffs sought a waiver of search and review fees on the grounds that the CIR
10 qualifies as a “representative of the news media” and that the records are not sought for commercial
11 use. 5 U.S.C. § 552(a)(4)(A)(ii) and (iii).

12 39. Plaintiffs sought expedited processing on the grounds that there is a “compelling
13 need” for these records because the information requested is urgently needed by an organization
14 primarily engaged in disseminating information in order to inform the public about actual or alleged
15 federal government activity. 5 U.S.C. § 522(a)(6)(E).

16 40. Plaintiff Mr. Michels certified that all statements were true to the best of his
17 knowledge.

18 41. In April 2018, a FOIA officer contacted Mr. Michels to discuss the second request
19 over the phone. A true and correct copy of that correspondence is attached as Exhibit E. On the call,
20 when Mr. Michels asked for an update on the contracts portion of the request, the FOIA Officer told
21 him he could call a supervisor at the FOIA office. Mr. Michels promptly called and left a message,
22 but never heard back.

23 42. To date, Plaintiffs have not received any further response from the agency.

24 43. More than 20 working days have passed since Plaintiffs submitted both Requests.

25 44. HHS has failed to comply with FOIA, 5 U.S.C. § 552(a)(6)(A)(i), requiring that an
26 agency make a determination within the 20 business days.

27 45. Plaintiffs now seeks injunctive relief.
28

CAUSE OF ACTION

Violation of Freedom of Information Act

46. Plaintiffs repeat and reallege paragraphs 1–28.

47. HHS is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

48. HHS has no lawful basis for declining to release the records requested by Plaintiffs under FOIA.

49. HHS has failed to expedite processing.

50. HHS has failed to act on Plaintiffs' request within the 20 business days required by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

51. Plaintiffs are entitled to declaratory and injunctive relief compelling the release and disclosure of the requested records.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendant HHS violated FOIA by failing to provide requested records in response to Plaintiffs' FOIA requests and failing to notify Plaintiffs of any determination;

2. Declare that the documents sought by their FOIA request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;


3. Order Defendant HHS to provide the requested documents to Plaintiffs within 20 business days of the Court's order;

4. Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

5. Grant Plaintiffs such other and further relief as this Court may deem just and proper.

1 DATED: June 25, 2018

Respectfully submitted,

2
3 By:  /s/

4 D. Victoria Baranetsky (SBN 311892)

THE CENTER FOR INVESTIGATIVE REPORTING

1400 65th St., Suite 200

Emeryville, CA 94608

Telephone: (510) 809-3160

Email: vbaranetsky@revealnews.org

Attorney for Plaintiffs